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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER SOTELO,

Defendant and Appellant.

F070292

(Super. Ct. No. FP004055A)

**OPINION**

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Stephanie L. Gunther for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Javier Sotelo appeals from an order denying a petition for certificate of rehabilitation and pardon, which he filed pursuant to Penal Code<sup>1</sup> section 4852.01. The trial court found that he was statutorily ineligible for relief based on the nature of his

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<sup>1</sup> All further statutory references are to the Penal Code.

underlying conviction. Sotelo alleges that the statutory bar violates his constitutional equal protection rights, but his claim is based on case law that has since been overturned. Finding no grounds for reversal, we affirm the challenged order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 1986, Sotelo was convicted of committing a lewd or lascivious act with a child under the age of 14 years in violation of section 288, subdivision (a). He was committed to state prison and released on parole in 1989. His parole terminated in 1992.

On August 1, 2014, Sotelo filed a petition for certificate of rehabilitation and pardon in relation to his section 288 conviction. At that point in time, section 4852.01 precluded such relief for individuals convicted under sections 288, 288.5, and certain subdivisions of sections 286, 288a, and 289. (Stats. 2014, ch. 280, § 3; Stats. 1997, ch. 61, § 2.) However, the statutory bar did not expressly apply to persons convicted of violating section 288.7, which proscribes sex acts with a child who is 10 years old or younger. (*Ibid.*) In light of this anomaly, Sotelo argued that the restrictions in section 4852.01 violated the equal protection clauses of the California and United States Constitutions. Sotelo's argument was based on the holding of a case from the Fourth District Court of Appeal that was published just a few months prior to the filing of his petition. (See Discussion, *post.*)

Sotelo's petition was heard by the trial court on October 9, 2014. By then, the California Supreme Court had granted review of the appellate decision upon which his equal protection claim was based, which resulted in depublication and left Sotelo with no viable arguments for relief. Accordingly, the petition was denied. The notice of appeal was filed on October 10, 2014.

### **DISCUSSION**

Section 4852.01 governs the procedure to obtain a certificate of rehabilitation, which is an intermediate step toward securing a full pardon from the Governor. (*People v. Ansell* (2001) 25 Cal.4th 868, 875-876 (*Ansell*)). Since 1998, the statute has

precluded individuals convicted under section 288 from being eligible for a certificate of rehabilitation. (*Ansell, supra*, at pp. 877-878; § 4852.01, subd. (c).) At the time Sotelo filed his petition, former section 4852.01, subdivision (d) barred relief to “persons serving a mandatory life parole, persons committed under death sentences, persons convicted of a violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, or persons in the military service.” (Stats. 2014, ch. 280, § 3; Stats. 1997, ch. 61, § 2.) In January 2015, following the enactment of Assembly Bill No. 1438 (2013–2014 Reg. Sess.) (hereafter Assembly Bill No. 1438), the statute was amended to add sections 269 and 288.7 to the list of precluded offenses, which are now set forth in section 4852.01, subdivision (c). (Stats. 2015, ch. 378, § 6; Stats. 2014, ch. 280, § 3.)

The question presented in this appeal is whether former section 4852.01, subdivision (d), as it existed in 2014, was constitutionally invalid because it barred persons convicted under section 288 from petitioning for a certificate of rehabilitation, while allowing other similarly situated persons, i.e., those convicted of more serious crimes under section 288.7, to seek relief. Sotelo does not dispute that the enactment of Assembly Bill No. 1438 rectified the equal protection issue underlying his claim. He contends, however, that the legislative remedy cannot be given retroactive effect.

Sotelo emphasizes that his claim is “identical to that of John Lynn Tirey” (italics omitted), referring to the appellant in the aforementioned case from the Fourth District Court of Appeal. The procedural history of the Tirey matter is summarized in *People v. Tirey* (2015) 242 Cal.App.4th 1255 (*Tirey*). In the initial appeal, which the Fourth District refers to as “*Tirey I*,” appellant Tirey successfully argued that the restrictions in former section 4852.01, subdivision (d) violated equal protection principles because of the disparate treatment of individuals convicted under section 288 in comparison to those convicted under section 288.7. (*Tirey, supra*, 242 Cal.App.4th at pp. 1257-1259.) “After *Tirey I*, Assembly Bill No. 1438 [] was introduced. The bill proposed amending sections

4852.01, subdivision (d), 290.5, and 3000.1 to clarify that a person convicted of violating section 288.7 was ineligible to apply for a certificate of rehabilitation (which eliminated the equal protection issue identified in *Tirey I* [...]). The stated intent of Assembly Bill No. 1438 was to abrogate the holding of *Tirey I*.” (*Tirey*, at p. 1259.)

The *Tirey I* decision was vacated by the granting of a petition for rehearing, but the same conclusions were reached by the majority of a divided panel in what the Fourth District refers to as the “*Tirey II*” opinion. (*Tirey*, *supra*, 242 Cal.App.4th at pp. 1257-1259.) “The California Supreme Court granted the Attorney General’s petition for review in *Tirey II*, and transferred the case back to [the Fourth District] for reconsideration in light of *Johnson v. Department of Justice* [(2015)] 60 Cal.4th 871.” (*Tirey*, at p. 1259.) On remand, the dispositive issue was “whether the passage of Assembly Bill No. 1438, which eliminated the equal protection issue identified in [*Tirey I* and *Tirey II*], supports the trial court’s denial of defendant’s application for a certificate of rehabilitation.” (*Ibid.*) The Fourth District answered that question in the affirmative, and in doing so rejected the same retroactivity argument that Sotelo makes in this appeal.

The analysis in *Tirey* begins with recognition of “the general rule that statutes, including those clarifying existing law, do not operate retrospectively.” (*Tirey*, at p. 1260.) “That rule, however, is subject to an exception, ‘when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: “ ‘An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. ... [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.’ ” ’ ” (*Id.* at pp. 1260-1261, quoting *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243-244 (*Western Security*).)

The holding of *Tirey* is as follows: “The legislative history of Assembly Bill No. 1438 reflects clearly that the Legislature viewed the statutory changes effected by that legislation as clarifications necessary in response to *Tirey I*.” (*Tirey*, at p. 1261.) “Given [the Fourth District’s] calls for legislative attention in *Tirey I* and the majority opinion in *Tirey II*, the language of the statutory amendments enacted via Assembly Bill No. 1438, and the intent to clarify existing law as set forth in the legislative history, we must conclude Assembly Bill No. 1438 was explicitly intended to abrogate the holdings of *Tirey I* and *Tirey II*, and to clarify the state of the law before our earlier decisions. To paraphrase the Supreme Court in *Western Security, supra*, 15 Cal.4th at page 238, the Legislature’s manifest intent was that Assembly Bill No. 1438 would apply to all persons, including persons convicted of violating section 288.7, convicted of forcible sex crimes committed against the most vulnerable members of our society. We therefore conclude Assembly Bill No. 1438 constituted a clarification of the state of the law before our decisions in *Tirey I* and *Tirey II*. Assembly Bill No. 1438 ‘has no impermissible retroactive consequences, and we must give it the effect the Legislature intended.’ ” (*Tirey* at p. 1263.)

We adhere to the precedent of *Tirey*, which is persuasive and dispositive of the issue on appeal. In summary, Sotelo was barred from obtaining a certificate of rehabilitation pursuant to former section 4852.01, subdivision (d), which was in effect at the time his petition was filed and denied. He remains ineligible for relief under the current law. (§ 4852.01, subd. (c).) The statutory amendments enacted by Assembly Bill No. 1438 constitute a clarification of the state of the law during the relevant time period, thus confirming that Sotelo was “not treated differently from others similarly situated.” (*Tirey*, at p. 1263.)

**DISPOSITION**

The order denying Javier Sotelo's petition for certificate of rehabilitation and pardon is affirmed.

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GOMES, J.

WE CONCUR:

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LEVY, Acting P.J.

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KANE, J.